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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1266

A. C. PARK,

Petitioner,

v.

H. T. (TOMMY) HUFF,

Respondent.

IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The respondent, H. T. (Tommy) Huff, respectfully prays that a writ of certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 20, 1975.

OPINION BELOW

The opinion of the Court of Appeals is reported at 506 F.2d 849.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the admission into evidence of the declarations to conspirators Worley and Seay, made during the pendency of a criminal conspiracy by conspirator Pinion, can be considered, under the circumstances of this case, to be so lacking of acceptable indicia of reliability, that the evidence should be altogether excluded from the fact finder's consideration, unless the prosecution provides confrontation between the declarant Pinion and the defendant Park?

STATEMENT OF THE CASE

1.

Procedural History

A. C. Park, the petitioner, was indicted for the dynamite murder of Solicitor General Floyd Hoard. Douglas Pinion, J. H. Blackwell, Lloyd George Seay, and Georgia Ira Worley were indicted for the same offense.

Petitioner's first trial resulted in a guilty verdict. On appeal, the Supreme Court of Georgia reversed the judgment of conviction. Park v. State, 224 Ga. 467 (1968). A petition for writ of certiorari to the Supreme Court of Georgia questioning the use of declarations by co-conspirators was denied. Park v. Georgia, 393 U.S. 980 (1968).

The case was then tried to a second jury. The jury found Park guilty and did not recommend him to the mercy of the Court. The second conviction was appealed to the Supreme Court of Georgia. That Court affirmed the judgment of conviction. Park v. State, 225 Ga. 618 (1969). A rehearing was sought before the Supreme Court of Georgia and denied. A second

petition for certiorari to the Supreme Court of Georgia resulted in the sentence of death by electrocution being vacated. Park v. Georgia, 408 U.S. 935 (1972). Again, this Court did not grant the writ of certiorari on the question raised in the instant proceeding.

Park then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia. On February 27, 1973, that Court entered an order providing, in part, that "absent a showing that the declarants' statements were inherently unreliable the testimony [was] clearly admissible under Dutton v. Evans, supra." The petitioner appealed this judgment. A majority of a panel of the Court of Appeals for the Fifth Circuit determined that the district court erred in its assessment of Park's sixth amendment claim respecting the admission of declarations of a co-conspirator and reversed. Park v. Huff, 493 F.2d 923, 935 (5th Cir. 1974) (Judge Coleman dissenting). Respondent-Appellee's application for rehearing en banc was granted on June 17, 1974. On January 20, 1975, Court of Appeals for the Fifth Circuit determined, en banc, that the sixth amendemnt confrontation rights of Park had not been violated and affirmed the district court. Park v. Huff, 506 F.2d 849 (5th Cir. 1975) (en banc) (six judges disenting).

The Facts

Solicitor General Floyd Hoard was the chief prosecuting officer of the Piedmont Judicial Circuit. That judicial circuit included the area in which petitioner operated and resided.

Immediately prior to the death of Solicitor General Hoard, the petitioner had engaged in a large scale illegal traffic in beer, wine, and whiskey.

Early in the summer of 1967, the Solicitor General Hoard began making plans to move against petitioner's illegal liquor business. Mr. Hoard planned to raid petitioner's home and a building located adjacent thereto and known generally as the "yellow house". Both buildings were used in the illegal liquor business. As a result of a tip about the impending raid, petitioner began moving his merchandise. Law enforcement officers, noting this activity, closed in immediately. The officers seized 2600 cases of beer, 31 cases of wine, and 31 cases of whiskey. The sales of this illegal business ranged from $300 to $1400 per week. Despite the raid, petitioner was back in business the following day. As a result of Solicitor General Hoard's activities, petitioner and an employee were found guilty of and fined for the illegal sale of spirits.

In addition, the court ordered the petitioner's home and the "yellow house" padlocked. The premises were not closed after entry of this order and remained opened prior to and after the death of the prosecuting attorney. Although petitioner's employee who operated the "yellow house" moved from those premises in August, he and petitioner anticipated his return on September 1, 1967. Floyd Hoard died from the explosion on August 7, 1967.

Park, Douglas Pinion, and Lloyd George Seay had all been engaged together in an illegal liquor business for many years. The relationship between the petitioner and Douglas Pinion was, apparently, particularly close. It was Pinion who traditionally executed petitioner's orders. The use of guns and the administration of beatings were part of the procedures employed by Dougals Pinion in th prosecution of petitioner's business. On the occasion noted at trial it was Mr. "Cliff's" money that Pinion sought to retrieve and it was Mr. "Cliff's" directions that stopped the strong-arm tactics in exchange for a promise to return taken money.

Upon the second trial of this case, Douglas Pinion, J. H. Blackwell, Lloyd George Seay, and George Ira Worley had been convicted of the murder of Solicitor General Hoard and were serving life sentences.

Lloyd George Seay had testified for the State during the first trial of the case. At the second trial, Seay was called as the State's witness. He refused, on the fifth amendment grounds, to answer questions related to the murder of Mr. Hoard. Thereafter, a transcript of Mr. Seay's testimony at the original trial was read to the jury. The testimony had been subject to vigorous cross-examination at the original trial. After the transcript of the witness's testimony at the original trial had been read to the jury trying the case now before the Court, Seay was recalled to the stand. He then testified that prior to the second trial he had been approached by one Farrell Nixdorf. Nixdorf offered the witness $10,000 and the services of any lawyer in the United States in exchange for Seay's promise that he would not testify upon petitioner's second trial and would repudiate his testimony of the first trial. On cross-examination, Seay related that "Mr. Nixdorf said the Old Man is willing to pay if you repudiate your statement, and he took a little car (sic) with his name on it; he wrote $10,000 on it. I have the card at home."

Seay then testified that Douglas Pinion approached him about killing Mr. Hoard. Thereafter, Seay approached George Worley. Worley was willing to commit the murder for $7500. Seay related the counteroffer to Douglas Pinion

and testified that Pinion stated "I'll go ask the Old Man." Forty-five minutes later, Pinion returned and related to Seay that "the Old Man won't go up."

Seay went on to testify that he, George Worley, and J. H. Blackwell drove to South Carolina where they purchased dynamite and detonating caps. The three men then returned to Georgia. Subsequently, Seay, Worley, and Blackwell drove to Hoard's home and attached the bomb to his automobile. After the murder, Douglas Pinion brought $5,500 to Seay for distribution among the participants in the murder.

Following Mr. Seay's live testimony to the jury, petitioner's counsel engaged in a thirty-six page cross-examination. Mr. Seay's live testimony to the jury was substantially similar to the transcript of his prior testimony which had been read to the jury after his initial refusal to testify. Of course, Mr. Seay's original testimony, presented in the form of a verbatim transcript, had been subjected to a vigorous cross-examination by the same attorney who represented petitioner at the second trial.

The prosecution also called John Hayman Blackwell as a witness. Mr. Blackwell refused to be examined on any matter, stating "I stand on the fifth amendment and refuse to answer any questions on the ground it might tend to

incriminate me." Thereafter the sworn testimony of Blackwell at the origianl trial, including his cross-examination, was read to the jury trying the case now before the Court.

The live testimony of the witness Seay revealed that the petitioner was known as the "Old Man". The State proved independently and through the testimony of law enforcement officers that petitioner was generally known in the community as the "Old Man".

The remaining portions of the evidence, which appear to be relevant to the issue being considered by the Court, are set out in the next section of respondent-appellee's brief in opposition to certiorari.[1/]

1/ The petition has outlined several "facts" relating to the witness Seay and the witness Blackwell which require comment by the respondent. Such comment has not been made in text because the discussion is not relevant to the issue raised in this proceeding.

(continued on next page)

(Footnote 1/ continued)

On the day Blackwell confessed, a medical doctor had proscribed and the suspect had taken medicine for an asthmatic condition. The medication assisted his breathing. Prior to giving his statement, Blackwell, at his request, was allowed to visit one Tillie Gayton for twenty to thirty minutes. During the visit Gayton prevailed upon Blackwell to tell the officers what he knew about the case. He told the investigators, prior to being allowed to visit her, that he was in love with her and wanted her to hear about his involvement in the case before she read it in the newspaper. The only aspect of Blackwell's confession that he admitted being false, related to the activity of conspirator Seay on the night the car was wired with dynamite. Blackwell explained that he wanted Seay as involved in the crime as he was.

(Footnote continued on next page)

(Footnote 1/ continued)

Although the witness Seay testified to some extreme treatment and threats of a Sheriff Attaway, Seay did not respond to Attaway, and did not make a statement to other investigators until he was represented by counsel and until counsel was present. On every occasion that Seay talked and gave statements, his attorney was present. It should finally be noted that the "facts" identified by Park in his petition were never developed in the context of a hearing in which the voluntariness of the statements were drawn into question.

REASONS FOR NOT GRANTING A WRIT OF CERTIORARI

I.

THE HEARSAY DECLARATIONS CONNECTING A. C. (CLIFF) PARK WITH THE EXISTENT CONSPIRACY TO MURDER FLOYD HOARD WERE PROPERLY ADMITTED AS SUBSTANTIVE EVIDENCE AGAINST PARK, FOR THERE EXISTED A SATISFACTORY BASIS FOR THE TRIER OF FACT, THE JURY, TO EVALUATE THE TRUTH OF EACH STATEMENT.

As long as a trier of fact is provided a satisfactory basis for evaluating the truth of an out-of-court declaration, the unavailability of the declarant for cross-examination will not result in a defendant's being deprived of his sixth amendment right of confrontation. Dutton v. Evans, 400 U.S. 74 (1970); United States v. Puco, 476 F.2d 1099 (2nd Cir. 1973), cert. den. 414 U.S. 844 (1973); United States v. Adams, 446 F.2d 681, 684 (9th Cir. 1971), cert. den. 404 U.S. 943 (1971). The petitioner complains of the admission into evidence of certain declarations

made by Douglas Pinion to Lloyd George Seay and related by Seay during his testimony to the jury. He also complains of the admission into evidence of certain declarations made by George Worley to Lloyd George Seay and related by Seay to the jury. A careful examination of the circumstances, shown by the prosecution to exist at the time of the declarations, reveals a sufficient basis to admit the statements without cross-examination of the declarants Pinion and Worley.

These circumstances and facts, each noted below in the lower court's en banc opinion, suggested that the murder of Solicitor General Floyd Hoard was an objective to the perpetuation of an ongoing, profitable liquor conspiracy. Hoard had initiated several proceedings which were designed to smash Park's liquor business. The murder of the prosecutor removed the pressure against petitioner's illegal business operations. The prosecuting attorney had instituted padlock proceedings against Park, had caused confiscation of Park's contraband alcohol, had filed criminal accusations against Park and others, had caused Park to pay substantial amounts of money in fines, and had sub-

stantial amounts of contraband liquor destroyed. Also, Douglas Pinion insisted that the murder occur prior to the day that Mr. Hoard went to court to move against Park and others. Finally, it was shown that declarant Pinion acted on behalf of Park in the illegal liquor business and acted to the extent of inflicting bodily injury on those who interferred.

In the context of statements made between co-conspirators during the pendency of the illegal enterprise, a search for a motive to misrepresent or falsify another's involvement appears to be critical in the analysis of reliability. See Dutton v. Evans, 400 U.S. 74, 88-9 (1970); United States v. Baxter, 492 F.2d 150 (9th Cir. 1973), cert. dismissed, 94 S.Ct. 16 (1973); United States v. Puco, 476 F.2d 1099, 1104 (2nd Cir. 1973), cert. den. 414 U.S. 844 (1973). Douglas Pinion made statements to Lloyd George Seay which implicated Park in a conspiracy to murder Hoard. At the time the statements were made Seay was involved with Park in the illegal liquor business. Seay had dealt with Park directly. There is simply little if any possibility that Pinion would misrepresent the fact of Park's involvement at

a time when Seay was in contact with Park. In a prior case, the lower court has noted, Hoover v. Beto, 467 F.2d 516, 533 (5th Cir. 1972), cert. denied, 409 U.S. 1086 (1972), that a "satisfactory basis for evaluating the truth of the hearsay statement is afforded by presumed trustworthiness which results from common sense recognition of basic characteristics of human nature underlying most exceptions to the hearsay rule." Pinion had no reason to lie when he made the statement to Seay and, given his role as Park's agent and enforcer, the trier of fact could well judge the truth of the assertion without cross-examination of Pinion as to the substance of any directions given him by Park.

There are other factors which provide indicia of reliability in the absence of cross-examination. Pinion was certainly in a position to know the extent of Park's desire to murder Floyd Hoard. See Dutton v. Evans, 400 U.S. 74, 88 (1970). Given the time framework and the number of statements and contact with Seay, there was no possibility that Pinion's references were founded on faulty recollection. See Dutton v. Evans, 400 U.S. 74, 89 (1970).

Given the fact that the contested statements were made between persons tied together in an unlawful conspiracy to kill and given the law that the statements were properly introduced under the rule which permits proof of statements made in furtherance of a joint criminal venture, United States v. Williamson, 482 F.2d 508 (5th Cir. 1973), the evidence possessed the degree of reliability required by the confrontation clause of the sixth amendment. The jury considering Park's guilt had a satisfactory basis for evaluating the truth of the individual declarations. California v. Greene, 399 U.S. 149, 161 (1970). The circumstances and conditions existing at the time each declaration was made, proven by evidence independent of the declarations, provide Park a constitutionally adequate substitute for the loss of confrontation with the declarant. Of course, the jury remained the "ultimate judge of the reliability of any weight to be accorded to the evidence ruled admissible." Hoover v. Beto, 467 F.2d 516, 533 (5th Cir. 1972), cert. denied, 409 U.S. 1086 (1972).

II.

THE PHYSICAL AVAILABILITY OF A CO-CONSPIRATOR WITNESS WHOSE STATEMENT IS SOUGHT TO BE INTRODUCED AT TRIAL THROUGH THE TESTIMONY OF A CO-CONSPIRATOR WHO HEARD IT, IS NOT GENERALLY AND IS NOT UNDER THE CIRCUMSTANCES OF THIS CASE A FACTOR MITIGATING AGAINST THE ADMISSION OF THE HEARSAY TO PROVE THE TRUTH OF THE MATTER IN IT.

When A. C. (Cliff) Park stood trial a second time for the offense, Pinion, Worley, Blackwell and Seay had each received a sentence to life imprisonment and in each case the sentence was final. Blackwell and Seay pleaded guilty and there was no appeal taken on behalf of either of them. Pinion pleaded not guilty and stood trial. His conviction was affirmed prior to the March 1969 trial of Park under review here. Pinion v. State, 225 Ga. 36, 38 (1969). George Worley also stood trial, but did not appal.

As a direct consequence of the trials of Worley and Pinion, the prosecution and the defense involved in the Park case were in a position to know what the statements of the out-of-court declarants might be. Also, the two main witnesses for the prosecution, Seay and Blackwell, invoked the fifth amendment at the second trial when called to testify.

Although the confrontation clause analysis has often involved a consideration of the relative availability of the witness to the prosecution, see e.g., Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968), unavailability to the prosecution must generally be assumed or presumed in most cases involving co-conspirators. See generally, United States v. Burke, 495 F.2d 1226 (5th Cir. 1974); United States v. Baxter, 492 F.2d 150 (9th Cir. 1973), cert. dismissed, 94 S.Ct. 16 (1973); United States v. Puco, 476 F.2d 1099 (2nd Cir. 1973), cert. denied, 414 U.S. 844 (1973). In this regard, the absence of any reference to the availability of the declarant involved in Dutton v. Evans, 400 U.S. 74, 88 (1970), cannot be disregarded.

In Dutton the declarant was available to both parties and this Court treated the question only by suggesting that the defendant could have subpoenaed the witness to testify. Dutton v. Evans, supra at 89 n. 19.

In the case before this Court the availability of the declarants Pinion and Worley was more theoretical than real. Both stood trial and pleaded not guilty. It should not be assumed from this action that either defendant would have appeared and testified that when they made the declarations they invoked Park's name without factual basis. Park v. Huff, 493 F.2d 923, 933 (5th Cir. 1974). It should be assumed, on the other hand, that had they been called as witnesses by the prosecution they would have either invoked the fifth amendment, as did the other two witnesses, or denied any association with the scheme. Neither possibility would place Park in a much better position than he ultimately occupied in terms of cross-examination. An examination of two circuit court decisions where the availability of a witness was considered as determinative places the problem in this case in proper focus.

In Phillips v. Neil, 452 F.2d 337 (6th Cir. 1971), the application of a business records hearsay exception was considered in a case involving the issue of insanity. The prosecution relied on opinions and conclusions contained within the records, rather than produce the authors of the various opinions. The court found a denial of the defendant's right of confrontation and, of course, refused to shift the burden of production of the witnesses to the defendant. The court then noted that the apparent value of the introduction of the reports by the prosecution lay squarely in the fact that cross-examination was made impossible. Phillips v. Neil, 452 F.2d 337, 347 (6th Cir. 1971).

When the hearsay in issue is admitted under a co-conspirator exception, a very different problem is presented. In United States v. Puco, 476 F.2d 1099 (2nd Cir. 1973), cert. denied, 414 U.S. 844 (1973), a government agent relayed at trial the remarks of a co-conspirator of the defendant. The declarant had been convicted at an earlier trial, along with the defendant Puco. On appeal, however, Puco's conviction was reversed and the declarant's was not. United States v. Puco, 476 F.2d 1099, 1101 (2nd Cir. 1973),

cert. denied, 414 U.S. 844 (1973). The court noted that the declarant Gonzales was available to the prosecution only in theory. The "[g]overnment was uniquely hampered from putting (the declarant) on the stand." United States v. Puco, supra at 1105.

The involvement of the various co-conspirators in the Park case present an identical situation to that found in United States v. Puco, supra. Unless the declarant in a case involving co-conspirators actually becomes a prosecution witness, he will never be available. If the evidence to be given by the declarant is favorable to the defendant, he should be called as a defense witness. The practical unavailability of the witness, in regard to the confrontation clause analysis, is a persuasive and essential factor in reviewing the reliability of the out-of-court statement and allowing it to go to the jury in the secondary form.

III.

THE ADMISSION OF DECLARANT WORLEY'S ONE STATEMENT CONCERNING THE DEFENDANT PARK WAS MADE NECESSARY BY THE DEFENDANT'S OWN CONDUCT. WHEN PROPERLY ADMITTED UNDER THE CO-CONSPIRATOR EXCEPTION, ANY WEAKNESS IN THE HEARSAY SHOULD NOT RESULT IN THE DEFENDANT'S CONVICTION BEING SET ASIDE.

The statement made by declarant Worley to the witness Seay and relayed at trial, possessed much the same indicia of realiability of those of Pinion. Certainly Park was in a position to thoroughly cross-examine Seay about Worley's involvement and, if possible, show the lack of opportunity for Worley to know of Park's direct involvement. The statement was made in a context where it was strongly suggested that Worley had come to know of Park's involvement on his own. Seay had never mentioned Park's name to Worley when Worley made the reference to Cliff Park.

The statement was presented to the jury during the reading of a transcript of evidence at the first trial. This was

necessary because of Seay's initial refusal to testify and his initial invocation of the fifth amendment privilege. This in turn was occasioned by the investigator's contact with the witness after conviction. The testimony was not repeated during Seay's live testimony to the jury.

If a defendant procures the absence of a witness by his own wrongful conduct, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. Reynolds v. United States, 98 U.S. 145, 158 (1878); see also, Douglas v. Alabama, 380 U.S. 415, 420 (1965). Worley's statements were admitted against Park, because Park, through his investigator, caused the initial refusal of Seay to testify. For this reason alone, the testimony should not be considered by this Court as constituting a ground for review of the question presented.

CONCLUSION

For all of the above and foregoing reasons, this Court should not issue the writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted

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CERTIFICATE OF SERVICE

This is to certify that I have this day served true and correct copies of the foregoing Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by mail, by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record:

Wesley R. Asinof
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This _____ day of June, 1975. All parties required to be served have been served.

_____
Richard L. Chambers